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In The

Supreme Court of the United States

October Term, 1994

THE FLORIDA BAR,

Petitioner,

vs.

G. STEWART MCHENRY; WENT FOR IT, INC.; and JOHN T. BLAKELY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY BRIEF

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22 pp

TABLE OF CONTENTS

Page

ARGUMENT 1

I THE COURT SHOULD RETURN TO THE STATES A REASONABLE RANGE OF AUTHORITY TO DETERMINE WHETHER ATTORNEY ADVERTISING ADVERSELY AFFECTS THE ADMINISTRATION OF JUSTICE, AND TO REGULATE IT ACCORDINGLY 1

II THE LIMITS PLACED UPON STATE AUTHORITY BY THE DECISION BELOW EXTEND BEYOND ANY HERETOFORE RECOGNIZED BY THIS COURT AND ESTABLISH ATTORNEY ADVERTISING AS A PRIVILEGED CLASS OF COMMERCIAL SOLICITATION WITH A GREATER DEGREE OF INSULATION FROM REGULATION THAN OTHER CLASSES 12

A. The challenged rules meet the requirements for valid commercial regulations because they are narrowly tailored to serve substantial governmental interests 12

B. The challenged rules are valid time, place or manner restrictions 16

TABLE OF AUTHORITIES

Page

CASES

Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) ..... *passim*

Board of Trustees v. Fox, 492 U. S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989) 9, 10, 11, 12, 15

Central Hudson Gas & Electric v. Public Service Commission, 447 U.S. 557, 65 L.Ed.2d 341, 100 S.Ct. 2343 (1980) 8, 9, 14, 15

Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985) 4

Edenfield v. Fane, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) 3

Frisby v. Schultz, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) 13

Goldman v. Weinberger, 475 U.S. 503, 106 S.Ct. 1310, 89 L.Ed.2d 478 (1986) 3, 5

Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) 3, 4, 5

Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984) 3, 5

International Society for Krishna Consciousness, Inc. v. Lee, 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992) 4

Kovacs v. Cooper, 336 U.S. 77, 69 S.Ct. 448 (1949) 12, 14

McDonald v. Board of Election Comm'rs, 394 U.S. 802, 89 S.Ct. 1404 (1969) 17

TABLE OF AUTHORITIES – Continued

Page

Members of City Counsel v. Taxpayers for Vincent, 466 U.S. 806, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984) 12, 14

Ohralik v. Ohio State Bar Association, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978) 10, 11

Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) 7

Peel v. Attorney Registration and Disciplinary Com'n, 496 U.S. 91, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990) 8

Planned Parenthood v. Casey, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) 6, 7

Rankin v. McPherson, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987) 3, 5

Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) 16, 17, 18

Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705 (1973) 6

Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988) 8, 9, 10, 11

Ward v. Rock Against Racism, 491 U.S. 78, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) 13, 14, 16

Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 75 S.Ct. 461 (1955) 17

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985) 8

RULES

Sup. Ct. R. 24 1

ARGUMENT

I

THE COURT SHOULD RETURN TO THE STATES A REASONABLE RANGE OF AUTHORITY TO DETERMINE WHETHER ATTORNEY ADVERTISING ADVERSELY AFFECTS THE ADMINISTRATION OF JUSTICE, AND TO REGULATE IT ACCORDINGLY.

In its initial brief on the merits, The Florida Bar urged the Court to revisit the line of cases following *Bates* and to return to the States a reasonable degree of authority to determine whether attorney advertising adversely affects the administration of justice. The Respondent complains that the request to revisit the *Bates* cases introduced a new issue that was not included in the Questions Presented for Review in the Petition for Writ of Certiorari. Rule 24 of the Rules of the Supreme Court of the United States provides that the phrasing of the questions presented for review in a Brief on the Merits need not be identical with the questions set forth in the Petition for Writ of Certiorari, as long as the brief on the merits does not raise additional questions or change the substance of the questions already presented. The Florida Bar's brief on the merits is in full compliance with Rule 24. The substance of the Bar's argument presented under Point I of its brief on the merits was thoroughly laid out under Point I in the Petition for Writ of Certiorari.

The Respondents and amici argue that the record is devoid of any evidence that attorney advertising has had an adverse effect upon the administration of justice, and they present data indicating that there has been a relatively small number of lawyer disciplinary cases involving advertising. The arguments smack of the very

sophistry which the Respondent decries. The decisions following *Bates*, and their interpretation by lower federal courts, have severely narrowed the scope of permissible state regulation so that the States are now effectively limited to merely investigating and regulating deception, and nothing more. Even the regulation of deceptive advertising has been heavily burdened by the Court so that States must either show actual deception in a given case or must leap a high hurdle to establish that a given type of advertising is inherently misleading. Given the narrow range of permissible State action, it is not surprising that there are relatively few attorney disciplinary cases involving advertising. That fact alone does not establish that the nature and scope of attorney advertising which has developed since *Bates* is not adversely affecting the administration of justice.

It is also understandable that the record does not include conclusive proof of such adverse effect. As illustrated in The Florida Bar's initial brief, the decisions following *Bates* have held, as a matter of law, that States do not have a sufficient interest to step beyond the role of investigating deception in attorney advertising. As a result, States have not had the occasion or incentive to produce a record showing that other aspects of such advertising have an adverse impact upon substantial State interests. What The Florida Bar and its supporting amici urge is that the philosophical basis upon which State authority has been so severely restricted is unjustified by First Amendment law in general, and inconsistent with the application of commercial regulatory law in contexts other than attorney advertising.

Both the Respondent and amicus Institute for Access argue that the institutional speech cases cited by The Florida Bar are inapplicable to the case at bar.[1] The Respondent states that nothing in the institutional speech cases indicated that the Court intended that they be applied to the citizenry at large or to regulated professions. The Florida Bar has not suggested that they be so applied. As was discussed at some length in the Bar's initial Brief on the Merits, lawyers, in the conduct of their professional activities, are not judged as citizens at large, but as officers of the court entrusted with the administration of an essential element of a fundamental constitutional function. This Court recognized in *Edenfield v. Fane*, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993), that the application of First Amendment principles to professional advertising is not necessarily the same for lawyers as for other professionals.

The Respondent argues that the institutional speech cases are inapplicable to lawyer advertising cases because, "insubordinate prisoners, military personnel, school children and public employees pose direct threats to the operation of their institutions." *Brief of Respondents*, p. 36. Amicus Institute for Access argues that the institutional speech decisions are distinguishable because they involve speech which occurred on property owned by the

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[1] *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988); *Rankin v. McPherson* , 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987); *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984); *Goldman v. Weinberger*, 475 U.S. 503, 106 S.Ct. 1310, 89 L.Ed.2d 478 (1986).

government. Neither of the asserted distinctions has substance.

The institutional speech cases make no mention of the necessity of a direct threat to the institution's operation. They say only that the State can constitutionally regulate speech that is inconsistent with the mission of the institution. The cases also say nothing about the necessity of the speech taking place on government owned property. In this regard, amicus confuses the institutional speech cases with those in which reduced scrutiny was applied because the government was the proprietor of the property on which the speech occurred. Those cases have held that government owned property which has not been designated as a public forum may be restricted in its use, and a lesser First Amendment standard is then applicable. *E.g., International Society for Krishna Consciousness, Inc. v. Lee,* 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992); *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.,* 473 U.S. 788, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). The institutional speech cases cited in the Bar's Petition and Brief on the Merits rest upon a different philosophical premise. Those cases were not concerned with the nature of the property upon which the speech was exercised, but with the effect of the speech on the basic mission of the institution. Thus, in *Hazelwood, supra,* the Court focused upon speech expressed in "a school-sponsored publication, theatrical production, or other vehicle of student expression" having a "valid educational purpose." *Id.* at U.S. 273. As noted in the Bar's initial brief, the Court's concern was both with the effect upon the education of the students and the fact that the publication or production carried the

"imprimatur" of the State. The Court's reasoning in *Hazelwood* would have applied equally whether the expression took place in a play or publication produced on the school campus or anywhere else. The same is true of the reasoning in *Rankin, supra, Hudson, supra,* and *Goldman, supra.* The State's ability to impose reasonable regulations upon the speech of its employees, prisoners and military personnel in order to foster the successful pursuit of basic institutional missions remains the same whether that mission is taking place on government owned or controlled property or anywhere else.

This Court has recognized that a lawyer's professional advertising is entitled to First Amendment protection primarily because of its role in making the public aware of the availability of legal services and thereby increasing access to our system of justice. The State's interest in the effective administration of justice is surely as substantial as its interest in providing education, law enforcement, national defense and efficient public employment. Nevertheless, the *Bates* cases have failed to include consideration of the potential impact of attorney advertising upon the mission of administering justice as a factor in the overall equation.[2]

Amicus Institute for Access argues that *stare decisis* requires that this Court adhere to the precedent set in

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[2] The Respondents state that this is an "additional" State interest not mentioned in the lower courts. The State interest in the impact of attorney advertising upon professionalism and the administration of justice was not relevant below because a lower court cannot overrule a decision of this Court. Only this Court can revisit *Bates* and the cases which followed it.

Bates and its progeny. In support of its argument, amicus relies heavily upon this Court's decision in *Planned Parenthood v. Casey*, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). The Court has long recognized and in fact, reaffirmed in *Casey*, that "the rule of *stare decisis* is not an 'inexorable command,' and certainly is not such in every constitutional case." *Planned Parenthood v. Casey, supra* at S.Ct. 2808, and cases cited therein. In *Casey*, the Court took pains to note that the case required a uniquely stringent application of *stare decisis*. In its review of the principles announced in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 (1973), the Court stated:

> Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls for the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.
>
> The Court is not asked to do this very often, having thus addressed the Nation only twice in our lifetime, in the decisions of *Brown* and *Roe*. But when the court does act in this way, its decision requires an equally rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation.

Planned Parenhood v. Casey, supra at S.Ct. 2815. The case at bar does not involve one of those rare, intensely divisive national controversies and does not require the "rare

precedential force" that the majority considered necessary in *Casey*.[3]

A more comparable case to the case at bar, decided the year before *Casey*, was *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). In *Payne*, the Court also addressed the issue of *stare decisis*, concluding:

> [W]hen governing decisions are unworkable or are badly reasoned, "this Court has never felt constrained to follow precedent." [citation omitted] Stare decisis is not an inexorable command; rather, it "is a principle of policy and not a mechanical formula of adherence to the latest decision." [citation omitted] This is particularly true in constitutional cases, because in such cases "correction through legislative action is practically impossible."

Id. at U.S. 827. The Court noted that during the previous 20 terms it had overruled in whole or in part 33 of its previous constitutional decisions. It further justified its retreat from the earlier decisions on the grounds that such cases "were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions," and that the decisions had been "questioned by members of the Court in later decisions," and had "defied consistent application by the lower courts." *Id.* at U.S. 827-829. The description would aptly apply to *Bates*. The *Bates* cases have been characterized by

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[3] Having recognized that *stare decisis* is entitled to differing degrees of weight, depending upon the circumstances, it seems logical that the Court should afford it the least weight when considering matters involving the "internal" administration of its own profession and the regulation of its own officers.

a lack of consensus and shifting and splintered majorities. In the three major attorney advertising decisions which struck regulations following *Bates*, seven different justices have filed separate opinions expressing the belief that, in various degrees, the decisions were unduly restricting the ability of the States to regulate the particular advertising involved.[4] The frequency with which this Court has reversed attorney advertising decisions since *Bates* reflects, a continuing lack of consistent application.

The *Bates* line of cases were themselves inconsistent with case law that this Court was simultaneously developing and applying in other commercial speech contexts. Not only did the *Bates* cases fail to employ the reasoning which underlay the institutional speech cases, they imposed far greater restriction upon State regulation than is required by this Court's other commercial speech decisions. The Respondent and amici rely heavily upon *Central Hudson Gas & Electric v. Public Service Commission*, 447 U.S. 557, 65 L.Ed.2d 341, 100 S.Ct. 2343 (1980) as the seminal case establishing the test for valid commercial speech regulation. Yet, Justice O'Connor has noted that *Central Hudson* provides the very basis for returning to the States the legislative authority that was denied them by *Bates* and its progeny:

> Under the *Central Hudson* test, government has more than ample justification for banning or

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[4] *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988); *Peel v. Attorney Registration and Disciplinary Com'n*, 496 U.S. 91, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990).

strictly regulating most forms of price advertising.

* * *

Bates was an early experiment with the doctrine of commercial speech, and it has proved to be problematic in its application. Rather than continuing to work out all the consequences of its approach, we should now return to the States the legislative function that has so inappropriately been taken from them in the context of attorney advertising. *Central Hudson's* test for commercial speech provides an adequate doctrinal basis for doing so, and today's decision confirms the need to reconsider *Bates* in light of that doctrine.

Shapero v. Kentucky Bar Association, supra at U.S. 486, 487. In its application of the *Central Hudson* test to commercial speech in general, this Court has recognized the need to provide States with a reasonable degree of deference and has expressly rejected the least restrictive means test. *Board of Trustees v. Fox*, 492 U. S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989). Nevertheless, the attorney advertising cases decided since *Bates* have afforded the States virtually no deference, and have analyzed attorney advertising regulations in a manner which amounts to nothing less than the least restrictive means test.[5]

The majority in *Shapero*, for example, held that the State had no substantial interest sufficient to justify its regulation of the "pitch or style of a letter's type and its

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[5] As will be illustrated below, both the Respondent and amici are urging the Court to apply the least restrictive means test in the case at bar as well.

inclusion of subjective predictions of client satisfaction * * * ." The Court concluded that "a truthful and nondeceptive letter, no matter how big its type and how much it speculates can never 'shout at the recipient' or 'grasp him by the lapels' [citing *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978)] as can a lawyer engaging in face-to-face solicitation." *Shapero*, at U.S. 479. The Court thus overlooked the premise of the institutional speech cases and deprived the State of the ability to measure whether such used car type sales pitches adversely affected the public's perception of the legal profession and, in turn, its attitude toward, and faith in, the entire system of justice.[6] *Shapero* also was inconsistent with the Court's ruling one year later in *Fox* with respect to the importance of granting a reasonable degree of leeway to governmental decisionmakers "to judge what manner of regulation may best be employed" to accomplish its ends. *Id.* at U.S. 480. The Court had decided in *Ohralik* that face-to-face solicitation by lawyers presented too great an opportunity for overreaching and, thus, justified a prophylactic rule prohibiting such solicitation altogether. Yet, the majority in *Shapero* denied the State the right to regulate the format of a letter which emphasized in oversized type that the initial consultation with the lawyer was "FREE," and the enticement that the client "might be surprised" at what the lawyer would be

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[6] The Respondent and amici argue that the record was devoid of *proof* of an adverse impact upon the administration of justice. However, the problem with *Shapero* and the other *Bates* related cases is that they pronounced, as a matter of law, that the State had an insufficient interest to regulate such things as pitch and style in an attoney advertisement regardless of the effect.

able to do for him. Such solicitation is typical of "loss-leader" advertising used by some commercial establishments to draw customers into a face-to-face meeting where the salesman (or lawyer) is then able to apply precisely the type of face-to-face pressure that justified the regulation in *Ohralik*. Nevertheless, the opinion by the majority in *Shapero* held that the pitch and style of the letter was beyond the State's review, and that such bombastic appeals could "never" meet the *Ohralik* criteria for regulation.

In *Board of Trustees v. Fox, supra* at U.S. 480-481 , the Court emphasized the importance of granting the legislative and executive branches the leeway to exercise reasonable judgements in determining the necessary degree of commercial regulation:

> By declining to impose, in addition, a least-restrictive-means requirement, we take account of the difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires, and provide the legislative and executive branches needed leeway in a field (commercial speech) "traditionally subject to governmental regulation." [citing *Ohralik, supra.*]

The majority opinion in *Shapero* was entirely inconsistent with the deference in commercial regulation called for in *Fox* and placed the Court in the position of micro-managing and second guessing the State's regulatory judgment. Instead of granting the States deference, the cases following *Bates* have either denied the States any discretion at all or have imposed upon them a burden

which bears a striking resemblance to clear and convincing evidence. The inconsistency in the Court's application of First Amendment law to professional advertising cases as typified by *Shapero* on the one hand, and to other commercial speech cases as reflected in *Fox* on the other, itself justifies a revisitation of the *Bates* line without posing a threat to the principle of *stare decisis*.

II

THE LIMITS PLACED UPON STATE AUTHORITY BY THE DECISION BELOW EXTEND BEYOND ANY HERETOFORE RECOGNIZED BY THIS COURT AND ESTABLISH ATTORNEY ADVERTISING AS A PRIVILEGED CLASS OF COMMERCIAL SOLICITATION WITH A GREATER DEGREE OF INSULATION FROM REGULATION THAN OTHER CLASSES.

A. The challenged rules meet the requirements for valid commercial regulations because they are narrowly tailored to serve substantial governmental interests.

The Florida Bar argued in its initial brief that, while it was respectfully urging this Court to revisit the *Bates* line of cases, it was unnecessary to do so in order to reverse the decision in the case at bar. The Bar argued that the State has a substantial interest in preserving reasonable standards of personal privacy and tranquility in the community. In support of its position, the Bar cited *Members of City Counsel v. Taxpayers for Vincent*, 466 U.S. 806, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984) [allowing regulation of political signs on public property in the interest of aesthetic values]; *Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448

(1949) [allowing regulation of sound trucks in the interests of community comfort and convenience]; *Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) [allowing a prohibition of picketing in front of a private residence in the interest of privacy] and *Ward v. Rock Against Racism*, 491 U.S. 78, 109 S.Ct. 2746, 2754, 105 L.Ed.2d 661 (1989) [upholding regulation of music amplification in a public park].

The Respondent and amici do not dispute the fact that the State has a substantial interest in maintaining reasonable standards of personal privacy and tranquility. Instead, they argue that the challenged Florida regulation does not directly and proportionately serve such interest. In support of its argument, the Respondent states that grief is not the gravamen of the challenged rule since the rule applies to any accident, and asserts that it is the Bar's burden to prove that direct mail letters to accident victims "harms them and harms the administration of justice." Brief of Respondents, pp. 13, 14. Amicus Media Institute misstates the Bar's position to be that the State has a substantial interest "in keeping a particular message from certain adults because Petitioner believes they cannot handle the message." Brief of the Media Institute, *et al*, p. 9. The essence of these arguments is that, in order to sustain its rule, Florida must prove that every personal injury victim who receives a direct solicitation letter is in a state of grief and will be personally offended or otherwise injured by such letter.

In the first place, the Bar is not asserting that the State's interest is in protecting each individual from being harmed by the receipt of such letters. The State's interest is in maintaining a reasonable community standard of

privacy and personal tranquility. This was precisely the interest that justified regulations in *Taxpayers for Vincent, Kovaks, Frisby,* and *Ward.* The Respondent attempts to distinguish those cases by noting that the sound trucks and loudspeakers emitted "loud and raucous noises," that the sign ordinance was designed to "preserve urban aesthetics," and that the Court emphasized the "offensive and disturbing nature of the form of communication" when it permitted regulation of residential picketing. Brief of Respondent, p. 19. In these respects, however, the cited cases are actually indistinguishable from the case at bar.

As with the residential picketing, Florida's rule is directed at the "offensive and disturbing nature of the form of communication." In *Kovaks, Taxpayers,* and *Ward* the States did not seek to prove, and obviously could not practicably have proved, that each person who viewed the political signs or heard the loudspeakers or music was offended or otherwise adversely affected by them. What those cases approved was State enforcement of reasonable community standards of privacy, tranquility, and aesthetics. Similarly, in the case at bar, the State cannot practicably formulate any rule that will restrict direct solicitation letters only as to those accident victims who are grieving and who would find such letters offensive. In addition, any more subjective rule would leave both the advertising lawyer and the disciplinary arm of the Bar in confusion as to when a letter became a violation in any given instance.

The Respondent and amici cite the language of *Central Hudson* holding that a commercial regulation shall be "no more extensive than necessary" to serve the State's

interest. For the reasons noted above, the Florida rule is, in fact, the least restrictive workable regulation that would serve the State's interests. Furthermore, the Respondent and amici, in citing the language of *Central Hudson,* failed to note the Court's explination of the language a year later in *Board of Trustees v. Fox, supra.* In that case the court recognized the "difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires," and emphasized that its language in *Central Hudson* was not intended to imply that the least restrictive means test was applicable to commercial speech. The Court stated:

> What our decisions require is a " 'fit' between the legislature's ends and the means chosen to accomplish those ends," *Posadas,* 478 U.S. at 341, 106 S.Ct. at 2977 – a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served," *In re R.M.J., supra,* 455 U.S. at 203, 102 S.Ct. at 937; that employs not necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective. *Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.*

[emphasis supplied] The 30-day rule adopted by the Florida Supreme Court represents a reasonable accommodation which serves the State's interest without unduly burdening the lawyer.

B. The challenged rules are valid time, place or manner restrictions.

The Respondent and amicus Media Institute argue that the challenged rules are not content-neutral because they are limited in their application to letters which solicit legal business from persons who were victims of, or are relatives of victims of, personal injury or wrongful death. This Court has not held that content-neutrality is destroyed simply because reference must incidentally be made to the content in order to determine whether or not the class which is regulated is implicated. In *Ward v. Rock Against Racism, supra* at S.Ct. 2754, the Court specifically stated:

> A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. [citation omitted] Government regulation of expressive activity is content-neutral so long as it is "*justified* without reference to the content of the regulated speech."

[emphasis by Court] In *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), the Court upheld an ordinance which restricted the showing of sexually explicit motion pictures to limited geographical areas. The ordinance necessitated review of a film's content in order to determine whether it contained sexually explicit material and thus subjected it to the ordinance. The Court upheld the ordinance because it was "aimed not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theatres on the surrounding community." *Id.* at U.S. 47.

[emphasis by Court] The Court found that the City Counsel's "*predominate* concerns" were with the secondary effects of adult theatres, and not with the content of adult-films themselves. The fact that the City Counsel might also have been motivated by other factors which, by themselves, would not have passed constitutional muster was held to be irrelevant.

The challenged Florida rule serves two separate state interests, each of which is *justified* without reference to the content. First, as noted above, the State seeks to preserve a reasonable standard of personal privacy and tranquility on behalf of its citizens. It is not concerned with the message contained within the letters, which an attorney is free to deliver after the thirty-day period or at any time by other advertising media, but with the mode of delivery and the nature of the recipients. Second, as in *Renton*, the State is concerned about the *secondary effects* of such letters upon the public's perception of the legal profession and our system of justice.

The real argument that Respondent and amici is making, albeit couched in the terminology of content-neutrality, is that the challenged regulation is *under-inclusive* by failing to include all classes that they perceive to be in equal circumstances. This Court has firmly rejected the argument that an under-inclusive regulation is constitutionally suspect. *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 75 S.Ct. 461 (1955); *McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 89 S.Ct. 1404 (1969). Indeed, the under-inclusive argument was also advanced and rejected in *Renton* where Court stated:

> That *Renton* chose first to address the potential problems created by one particular kind of adult business in no way suggests that the City has "singled out" adult theatres for disciminatory treatment. [Id. at U.S. 53].

The challenged Florida rule meets each of the elements of a valid time, place or manner restriction and should be upheld on that basis alone if no other.

Respectfully submitted,

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